FOLEY'S LIST

# PROPERTY LAW

## RECENT DEVELOPMENTS


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# PROPERTY LAW RECENT DEVELOPMENTS

**Presented on 27 April 2017 at Leo Cussen Centre for Law**

**BY**

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**Introduction.**

1. My co-presenter Anna Wilson will deal with certain topics. The topics dealt with by me in this paper are –

   HomesVic Program – paragraphs 2 – 4.

   Strata Title reforms – paragraphs 5 – 9.

   Priority Notices – An update since their introduction – paragraphs 10 – 11.

   The advance of Electronic Conveyancing – paragraphs 12 – 14.

   The impact in 2017 of the latest Contract for sale and purchase of land on property transactions – paragraphs 15 – 32.

**The HomesVic Scheme.**

2. The HomesVic Scheme derives from an announcement by the Premier dated 5 March 2017 under the heading "Putting First Home Buyers First". The gist of the Scheme is –

   - It commences in January 2018;
   - The State will co-purchase up to 400 new or existing homes, taking an equity share of up to 25 per cent each;
   - $50 million is allocated, the Scheme being described as "pilot" to be tested across the State;
   - The Scheme "will target first home buyers who are able to meet regular mortgage repayments, but because of rising rental costs, haven't been able to save a big enough deposit". Eligible applicants will include couples earning up to $95,000, and singles earning up to $75,000;
   - Buyers must have a 5% deposit;
   - When the properties are sold, *HomesVic* will recover its share of the equity.

3. The same announcement also stated that the Government would contribute $5 m. to a national, community sector, shared equity scheme, *Buy Assist*. This Scheme would have similar goals to *HomesVic* and help deliver an additional 100 shared

equity homes and help low to medium income households get a foothold in the property market.

4. The announcement also stated that the Government would give first home buyers priority in government-led urban renewal developments, with at least 10 per cent of all properties allocated to first time buyers. This approach is to be used for the first time at the Arden development in North Melbourne.

**Strata Title reforms.**

5. The Owners Corporations Amendment (Short-stay Accommodation) Bill 2016 passed the Legislative Assembly in 2016 and is currently before the Legislative Council.

6. The main purpose of the Bill is to amend the Owners Corporations Act 2006 to regulate the provision of short-stay accommodation arrangements in lots or parts of lots affected by an owners corporation (s. 1). (Assuming enacted) it comes into operation on 1 July 2017 but any particular provision may by proclamation come into operation on an earlier day (s. 2). The central definitions inserted by s. 4 into s. 3 of the 2006 Act are:

"*short-stay accommodation arrangement*" which means a lease or licence for a maximum period of 7 days and 6 nights to occupy a lot or part of a lot affected by an owners corporation that is in a building, or that part thereof, classified as a Class 2 building in Part A3.2 of Volume One of the Building Code of Australia. The BCA defines Class 2 building as "a building containing 2 or more *sole-occupancy units* each being a separate dwelling". "Sole-occupancy unit" is defined to mean -

"a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes—

(a) a dwelling; or
(b) a room or suite of rooms in a Class 3 building which includes sleeping facilities; or
(c) a room or suite of associated rooms in a Class 5, 6, 7, 8 or 9 building; or
(d) a room or suite of associated rooms in a Class 9c building, which includes sleeping facilities and any area for the exclusive use of a resident."

*"short-stay provider"* means: the owner, lessee or sub-lessee of a lot or part thereof that is leased or licensed by that person to a person under a short-stay

accommodation arrangement; or an "agent provider", defined as someone who, for a fee, arranges and manages short-stay accommodation on behalf of the owner, lessee or sub-lessee.

7. The Bill then inserts into Part 10 of the 2006 Act a new Division headed "Division 1A—
Complaints and procedures—short-stay accommodation arrangements". The most important provisions of this Division are:

- a lot owner, occupier or manager may make a complaint to the owners corporation about an alleged breach by a short-stay occupant of the conduct proscriptions applying to short-stay accommodation arrangements (s. 159A(1));
- Section 159A(2) lists these "conduct proscriptions" which are in substance:
  unreasonable creation of noise, unauthorised by the owners corporation;
  behaviour likely to unreasonably and substantially interfere with peaceful enjoyment of another lot;
  using a lot or the common property so as to cause a substantial hazard to the health, safety and security of any person or an occupier;
  unreasonably and substantially obstructing the lawful use and enjoyment of the common property by an occupier or a guest of an occupier;
  intentionally or negligently, substantially damaging or altering a lot or the common property, or structure thereon;
- a complaint cannot be made under this section in relation to a personal injury (s. 159A(5));
- the owners corporation is then required to decide whether to take action on the complaint or (if otherwise coming to its attention) on a breach of the conduct proscriptions (s. 159B). It must believe that on reasonable grounds that the short-stay occupant has committed the alleged breach (s. 159B(3));
- if the owners corporation decides not to take action it must give a notice of decision with reasons (s. 159C);
- if the owners corporation decides to take action in respect of an alleged breach it must give notice of the allegation to the lot owner and the short-stay provider and may do so to the short-stay occupant. The notice must

specify the breach and state that the recipient is required to rectify the breach and state that the owners corporation may apply to VCAT for certain relief (ss. 159D, 159E).

8. The Bill then inserts into Part 11 of the 2006 Act a new Division headed "Division 1A—Short-stay accommodation disputes". The most important provisions of this Division are:

- VCAT may determine a dispute relating to an alleged breach by a short-stay occupant of the proscribed conduct (s. 169A), on the application of the owners corporation, a lot owner or former lot owner, a lot owner on behalf of an owners corporation, an occupier, or an agent provider (s. 169B);
- VCAT may make any order it considers fair including: a prohibition order; a loss of amenity compensation order; an order for a civil penalty under s. 169G; any applicable order that VCAT may make under s. 165 (being the general section providing for orders in determining an owners corporation dispute) (s. 169C);
- A prohibition order is an order prohibiting the use of a lot or part thereof if: a notice under section 159D has been served on a short-stay provider on at least 3 separate occasions within 24 months; and each notice relates to an alleged breach of the proscribed conduct. In the second reading speech the Minister stated that prohibition orders were "particularly aimed at the use of apartments as 'party houses'". A prohibition order ceases to have effect on sale of the lot, in substance to someone (according to a long list) unrelated to the vendor (s. 169D);
- A loss of amenity compensation order is an order for compensation up to $2,000 in favour of any occupier in the same building or part thereof who has suffered a loss of amenity caused by a breach of the proscribed conduct as to noise, interference with peaceful enjoyment, use so as to cause a substantial hazard to the health, safety and security of an occupier; and obstruction of lawful use. An application for this order must be made within 60 days of the breach. If VCAT makes orders in favour of multiple applicants in relation to the same breach it must take into account whether the total compensation proposed is proportional to the harm caused by the breach (s. 169E);
- Section 169F sets out what VCAT must consider in making an order;

- VCAT may also impose a civil penalty not exceeding $1,100 for breach of the proscribed conduct (s. 169G);
- Section 169H imposes joint and several liability on the short-stay provider and short-stay occupant for satisfying certain orders, but (s. 169H(3)) a provider is not liable for satisfying a loss of amenity compensation order if VCAT is satisfied that the provider took all reasonable steps to prevent any relevant breach of the proscribed conduct.

9. Note that the definition of "*short-stay accommodation arrangement*" means a lease or licence etc. This is a reminder that in *Swan v Uecker* [2016] VSC 313 Croft J held an AirBnB arrangement to amount to a lease not a licence. The judgment contains a guide to the difference between the two, the touchstone being whether or not what is granted is exclusive possession.

**Priority Notices – An update since their introduction.**

10. Sections 91C – 91J enabling priority notices were inserted into the Transfer of Land Act in 2014 but such notices were not implemented by the Land Titles Office until December 2016. Further, the Land Legislation Amendment Bill 2017 introduced into Parliament on 21 March adds to the 2014 legislation. The legislation, including as to be amended by the Bill, provides inter alia (with the author's notes thereunder) as follows -

    91C A recorded priority notice gives any instrument specified in the notice, for the purposes of registration or recording of the specified instrument, priority for 60 days from the date the notice is lodged.

    *Note: Accordingly once a priority notice is recorded, it has the effect of preventing any dealing being registered over the subject folio for 60 days pending the lodgement of the intended dealings. The applicant's details and the (specified) intended dealings will be displayed on any subsequent Register Search Statement. The 125 day activity panel will show the recording of the priority notice.*

    91D(1) A priority notice—

    (a) must be in the approved form; and

    (b) may only be lodged using an ELN; and

(c) may be in respect of any type of instrument and regardless of the proposed method of lodgement of the instrument specified in the priority notice.

(2) If a priority notice is in the approved form, the Registrar may accept lodgement of the priority notice as sufficient evidence that the applicant who lodged the priority notice, or who had the priority notice lodged on their behalf, is entitled to lodge the priority notice.

(3) The Registrar is not required to give any person notice of a priority notice recorded in the Register.

*Note: A priority notice must be lodged using an ELN (Electronic Lodgment Network), irrespective of whether the intended dealing(s) will be lodged in paper or electronically. Currently the only ELN is PEXA (Property Exchange Australia). A subscriber to an ELN can lodge on behalf of a registered proprietor or any incoming party. Depending on what type of instrument is intended to be lodged, the following information will need to be included in the priority notice:*

- *instrument type, eg mortgage discharge or transfer;*
- *the dealing number of the document;*
- *the name of the party receiving the document, eg transferee or mortgagee.*

*All instruments cited in the priority notice must belong to the same transaction and be set out in the intended order of lodgement. If not, the instrument or transaction will be lodged, but will not be processed.*

91E Subject to section 91F, any instrument lodged after a priority notice but before the instrument specified in the priority notice is lodged must not be registered until—

(a) after the instrument specified in the priority notice is registered or recorded; or

(b) the priority notice ceases to have effect.

91F An instrument that is capable of being recorded is not affected by a priority notice and may be lodged and recorded at any time.

**Examples**

Examples of instruments that are recorded include caveats, warrants, statutory charges and notifications.

*Note: A common feature of these instruments is that they do not currently require a supporting Certificate of Title*.

91FA (contained in the 2017 Bill)

91FA(1) An applicant specified in a priority notice may apply to the Registrar for an extension of the priority notice.

(2) An application for extension of a priority notice under subsection (1)—

(a) must be in the approved form; and

(b) must be made before the expiry or withdrawal of the priority notice; and

(c) may only be lodged using an ELN; and

(d) may be made only once.

(3) An extension of a priority notice extends the period of priority given to an instrument specified in the notice to 90 days from the date of lodgement of the priority notice.

*Note: In the December 2016 LIJ p. 66 Russell Cocks pointed out that the 60 day period was too short for many settlements and so the notice would have to be lodged some weeks after the contract of sale or lodged at the time of the contract but expire before settlement. S. 91FA would appear to remedy this.*

91G(1) A priority notice expires on the earlier of—

(a) registration or recording of the instrument specified in the priority notice; or

(b) 60 days after the date of lodgement of the priority notice.

[The 2017 Bill inserts “or” after (b) and then inserts –

"(c) 90 days after the date of lodgement of the priority notice if the notice has been extended under section 91FA."]

(2) A priority notice may be withdrawn at any time before its expiry by lodging a withdrawal of priority notice.

(3) A withdrawal of priority notice—

(a) must be in the approved form; and

(b) may only be lodged using an ELN.

*Note: A priority notice expires at the earlier of when the anticipated instrument or transaction is registered or unless extended at midnight on the 61st calendar day from the day the priority notice is lodged. A withdrawal can only be withdrawn by the subscriber who lodged the*

*priority notice. When a priority notice is withdrawn, the recording of the notice on the folio(s) will be removed. This will be shown in the 125 day activity panel. On withdrawal priority will be lost against any dealing awaiting registration.*

91H(1) If an instrument lodged is not consistent with the details of an instrument specified in any priority notice, the instrument must not be registered or recorded.

(2) If a priority notice contains incorrect details, the priority notice—

(a) may not be corrected; and

(b) may be withdrawn and a new priority notice lodged.

*Note: Accordingly the intended instrument or transaction lodged must precisely match the details contained in the priority notice.*

91I Any person who is adversely affected by a priority notice may bring proceedings in a court against the applicant specified in the priority notice for the removal of the priority notice and the court may make any order the court thinks fit.

91J If a priority notice is lodged without reasonable cause under this Part, the applicant specified in the priority notice is liable to compensate any person who sustains damage as a result of the recording of that notice as the court considers appropriate.

11. A lawyer approaching priority notices naturally thinks of caveats. Priority notices and caveats are different but can overlap in their application, eg on the signing of a contract of sale the purchaser acquires an equitable interest and so can caveat and also lodge a priority notice (or both). On the other hand an example of something caveatable but outside the priority notice regime as there is no dealing is the contructive trust arising from common intention or based on *Muschinski v Dodds* (1985) 160 CLR 583 (see *Sivritas v Sivritas* (2008) 23 VR 349 at [128] – [134]). Other differences are: the Registrar is not obliged to give notice to the registered proprietor of lodgement of a priority notice; there is no provision in a priority notice for the applicant to consent to the lodgment of other instruments; a caveat can be amended (but it is more difficult to amend the interest claimed in a caveat than to amend the grounds: *Percy & Michele Pty Ltd v Gangemi* [2010] VSC 530; *S & D International Pty Ltd (in liq) v Malhotra* [2006] VSC 280 at [16]).

**The advance of Electronic Conveyancing.**

12. It is impracticable here to write a dissertation on Electronic Conveyancing generally or on the special conditions in the REIV/LIV contract concerning it. As the word "advance" is used, it is most appropriate to mention what is stated in the Land Victoria Customer Information Bulletins issued this year, being 162 and 163.

13. Bulletin 162 includes –

- The Australian Registrars' National Electronic Conveyancing Council (ARNECC) published an updated version of the National Mortgage Form Specification in December 2016. The specification of the National Mortgage Form is to enable financial institutions and other mortgagees to prepare their systems and procedures for 26 May 2017, when new requirements come into place to prepare and lodge real property mortgages in all Australian states and territories. The National Mortgage Form can be lodged electronically or on paper from this date. Until 31 December 2017 the National Mortgage Form and existing approved forms can be lodged on paper. From 1 January 2018 only the National Mortgage Form will be accepted for lodgement;
- On 1 August 2017 refinance transactions, where the transacting parties to discharges of mortgage and mortgages are authorised deposit-taking institutions (ADIs) under the *Banking Act 1959* (Cth), to be lodged electronically (both retail and commercial mortgages);
- The Registrar is proposing to expand requirements for ADIs to require all refinance transaction instruments –discharges of mortgage and mortgages – signed on or after 1 August 2017 when both parties in the transaction are ADIs, to be lodged using an ELN. For all mortgagees that are ADIs the following conditions will apply, in addition to the requirements for a discharge of mortgage and mortgage signed on or after 1 August 2016:
  - a discharge of mortgage signed on or after 1 August 2017 must be Lodged using an ELN, except where the discharge of mortgage is to be Lodged with any transfer of land or mortgage to a mortgagee who is not an ADI for the same folio(s) of the Register; and
  - any mortgage signed on or after 1 August 2017 must be Lodged using an ELN, except where the mortgage is to be Lodged with any discharge of mortgage from a mortgagee who is not an ADI or transfer of land for the same folio(s) of the Register.

- Over time, paper Certificates of Title (pCTs) will be converted to electronic Certificates of Title (eCTs). The Registrar proposes to use section 27BAA of the Transfer of Land Act 1958 to declare void certain classes of pCTs. Initially, this was limited to pCTs with an ADI as the first registered mortgagee. Conversion of pCTs with ANZ, CBA, NAB and Westpac and their brands as first mortgagee was completed in October 2016 [over 2 million titles].

14. Bulletin 163 includes –

- In July 2017 a second bulk conversion pCTs to eCTs will be undertaken, this time by ADIs other than the four major banks;
- In November 2017 survivorship applications, transmission applications and change of name functionality will be available in PEXA;
- 1 December 2017 - Standalone caveats and withdrawals of caveat to be lodged electronically. This requirement applies to PEXA subscribers, and conveyancers and lawyers acting for a party or for themselves and PEXA Subscribers;
- 1 December 2017 - Non-ADI standalone discharges of mortgage, standalone mortgages and refinance transactions are to be lodged electronically. This requirement applies to conveyancers and lawyers acting for a non-ADI and non-ADIs who are PEXA Subscribers;
- 1 March 2018 - All survivorship applications, transmission applications and standalone transfers must be lodged electronically. This requirement applies to conveyancers and lawyers acting for a party or themselves and PEXA Subscribers;
- 1 October 2018 - All combinations of transactions available in PEXA to be lodged electronically. For example, a case comprising a withdrawal of caveat, discharge of mortgage, transfer and mortgage. This requirement applies to conveyancers and lawyers acting for a party or themselves and PEXA Subscribers;
- 1 August 2019 - All transactions to be lodged electronically. This requirement applies to conveyancers and lawyers acting for a party or themselves and PEXA Subscribers. The exception will be when there is an existing paper

instrument that has been signed prior to the date when electronic lodgement of that particular class of instrument or transaction is required.

**The impact in 2017 of the latest Contract for sale and purchase of land on property transactions.**

15. The latest form of contract in common use is the REIV/LIV contract of sale of real estate copyright May 2016. This takes the form that prescribed by the Estate Agents (Contracts) Regulations 2008 with three special conditions, namely: 1 – as to acceptance of title; IB – as to foreign resident capital gains withholding; 2 – as to electronic conveyancing. Special condition 1, inserting general condition 12.4, is inserted because of a point of obscurity in the drafting of s. 27 of the Sale of Land Act, namely is the stakeholder authorized under s. 27(7) to release a deposit paid in the sale of Torrens land if the purchaser has not accepted title? The special condition overcomes this by providing that where the purchaser is deemed by s. 27(7) to have given the deposit release authorization referred to in s. 27(1) the purchaser is also deemed to have accepted title in the absence of any prior express objection to title. The latter two special conditions are too long to discuss and it is thought more beneficial to mention decisions in recent years interpreting this contract.

16. Decisions in recent years interpreting this contract are -

*Lo & Another v Russell* [2016] VSCA 323 – cooling off.

*Peluso v Safi* [2011] VSC 504 - lapse of offer.

*O'Toole v Kent* [2015] VSC 470; *Putt v Perfect Builders Pty Ltd* [2013] VSC 442 – subject to finance.

*Mathieson Nominees v Aero Developments & Ors* [2016] VSC 131 – nomination.

*Qin v Smith (No. 2)* [2013] VSC 476 – inability to give vacant possession.

*ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542 – the vendor who had previously sold the land.

*Douglas v Simons Builders P/L and Anor* [2015] VSC 118 - payment by unusual means.

*Duoedge Pty Ltd v Leong & Anor* [2013] VSC 36 – a purchaser confused about price.

*Patmore & Anor v Hamilton* [2014] VSC 275 – condition of the property - General condition 24.

*Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd* [2014] VSC 57 – time of day for settlement.

*Pettiona v Whitbourne* [2013] VSC 205 - calculation of vendor's loss if property not resold.

*Portbury* – vendor's duty on resale.

**Cooling off.**

17. The most recent decision of note concerns cooling off, which involves both s. 31 of the Sale of Land Act and the contract - *Lo & Another v Russell* [2016] VSCA 323. Section 31 provides –

"(2) Where a purchaser … signs that contract he may at any time before the expiration of three clear business days after he has signed the contract give notice to the vendor that he wishes to terminate the contract and where he has signed that notice and given it in accordance with the provisions of this section the contract shall be terminated.

(3) A notice under subsection (2) shall be given to the vendor or his agent or left at the address for service of the vendor specified in the contract or the address of his agent within three clear business days after the purchaser has signed the contract.

(6) A contract to which this section applies shall contain a conspicuous notice advising the purchaser that he may before the expiration of three clear business days after he signs the contract give notice that he wishes to terminate the contract".

Section 31(5)(d) provides that s. 31 did not apply where the purchaser was an estate agent or a corporate body. Section 30(1) defines "Vendor" to include 'any person acting as agent for the vendor'. Section 15 provides as to how any notice may be served.

18. On 26 February 2014 the respondent signed an authority appointing an estate agent (Marshall White), its employee handling the sale being Gibbons. The applicants inspected the property and on 3 April the applicant Tan exchanged text messages with Gibbons, and the applicants made an offer to Gibbons. They provided him with two signed two copies of a contract of sale. The cover page contained the s. 31(6) notice including -

"You may end this contract within 3 clear business days of the day that your [sic] sign the contract …. You must either give the vendor or the vendor's agent **written** notice that you are ending the contract or leave the notice at the address of the vendor or the vendor's agent to end this contract within this time in accordance with this cooling-off provision. … "

Under 'PARTICULARS OF SALE' were listed the 'vendor's estate agent' (giving Marshall White's contact details including Gibbons' email address), followed by the name (but no contact details) of the 'vendor', the name and contact details of the 'vendor's legal practitioner or conveyancer', and other matters. The special conditions included that any demand, notice or document required to be served by or on any party may be served by or on the legal practitioner or a conveyancer for that party. General condition 11.1 provided that the purchaser must pay the deposit to inter alios "(a) … the vendor's licensed estate agent;".

19. The offer was rejected but on the evening of Friday 4 April a price was agreed and the contract previously signed by the applicants was appropriately amended and signed. However, at 5:56 pm on Wednesday 9 April Tan emailed Gibbons (copying in others) stating, after identifying the property, addressing the recipients and preliminary words:

"we have decided to exercise the 3 clear business days' cooling off period with immediate effect.
That is, we are withdrawing from this tentative Contract of Sale as allowed by law.
Thanks.
Regards,
Eng K Tan"

The respondent conceded receipt within the three clear business days but denied that Gibbons was the correct recipient. Cameron J found for the vendor but the Court of Appeal granted leave to appeal and allowed the appeal, holding:

1. Section 31(3) did not designate the vendor's estate agent as a person capable of receiving the notice. "Agent" in s. 31(3) had its ordinary legal meaning, ie someone authorised by the vendor to receive the notice [45].
2. However, although s. 31 did not insist that the vendor nominate an agent or provide particulars for service thereon, a contract may do so.
3. Construing the contract in accordance with general principles of construction: the notice on the front of the contract used the words "the vendor or the vendor's agent"; the next page gave details of the "vendor's estate agent" and no other person was described in the contract using the term "agent"; the cover page included the words "Any person whose signature is secured by an estate agent acknowledges being given by the agent ..."; and "agent" was commonly used as shorthand for an estate agent. The purpose of the notice provision was

better achieved by a construction enabling the purchaser to rely on the common use of the word 'agent' to describe an 'estate agent', rather than requiring the purchaser to divine from provisions which do not even use that word that the true 'agent' was, in fact, somebody else. Accordingly the respondent's conduct in signing the contract conveyed that the requisite authority was given to Gibbons (and Marshall White) [51], [56], [60].

**Lapse of offer.**

20. In *Peluso v Safi* [2011] VSC 504, Safi on 22 February 2010 executed a form of contract for purchase of land from Peluso. The document had the following features –

(a) The following deletion on page 1 -

"~~This offer will lapse unless accepted within [blank] clear business days (three days if none specified)~~"

(b) It required an initial deposit upon signing (which, incidentally, Osborn J held must mean signing by both parties [9]), the payment of the balance of the deposit on 9 March 2010, and $160,740 payable at settlement on 23 April 2010.

(c) A handwritten special condition stated that General Condition 14 applied, ie as to sale subject to finance, that the lender was as "an approved financial institution", that the loan amount was "$142,900.00 (not less than)" and that the loan approval date was 8 March 2010. General Condition 14 inter alia provided in substance that the purchaser could end the contract if the loan was not approved by the approval date and the purchaser gave notice of termination within two clear business days thereafter.

On 17 March 2010 the contract was signed on behalf of Peluso and such signature was, it appeared, communicated to Mr Safi. Safi could not obtain finance, the contract was terminated, a Magistrate held that Peluso was not entitled to retain the balance of deposit, and Peluso appealed.

21. Osborn J held ([11], [13]) that by 17 March it was no longer open to vendor to accept the offer because –

(a) The offer comprised in the documents signed by the purchaser comprehended sequential obligations intended to commence with the conclusion of the contract by acceptance of the offer before 9 March 2010;

(b) Of fundamental uncertainty was what, if any, was the obligation of the purchaser to pay the deposit if the contract was not concluded before that date;

(c) As at 17 March there was also a fundamental uncertainty as to the purchaser's rights, if any, under the condition as to finance, because the two days notice provision had already expired. The vendor's delay thus deprived the purchaser of any opportunity to take advantage of the special condition. Accordingly Peluso did not accept the offer on the terms on which Safi made it;

(d) Where no date for lapse is specified in an offer, it is deemed to lapse unless accepted within a reasonable time. In this case that time could not extend beyond a date when Safi had a reasonable opportunity to exercise an unqualified right under General Condition 14, which date was necessarily some time prior to the approval date of 8 March;

(e) In summary the offer lapsed because effluxion of time rendered it incapable of acceptance, alternatively because by the time of the purported acceptance performance of the contract was impossible in accordance with the terms of the offer.

Further, Safi had not affirmed the contract by after 17 March 2010 saying “I will go ahead if I can get finance” – this was not an affirmation of the strict terms of the contract. [15]

For completeness, if an offer is stated to be open for a particular time it cannot be accepted outside that time, such purported acceptance being a counter-offer, and an offer stated to be open for a particular time can be revoked within that time: J. W. Carter, E. Peden and G. J. Tolhurst, Contract Law in Australia, 5th ed, 2007, [3-42], [3-54].

**Subject to finance.**

22. *O'Toole v Kent* [2015] VSC 470 is a reminder of the necessity of contractually stating that the purchase is subject to finance. This contract was not stated to be subject to finance but the purchaser’s evidence was [16(f)]:

> "I believe the contract was always subject to finance as my wife and I were utterly dependent upon those funds to perform and complete the contract and we informed the Plaintiff's selling agent of this prior to my wife signing the contract."

Mukhtar AsJ held that there was no implied term to this effect, inter alia because this was inconsistent with the express terms imposing an absolute obligation on the purchaser to settle the contract on the completion date.

23. In *Putt v Perfect Builders Pty Ltd* [2013] VSC 442 the contract was subject to a particular lender approving a loan of $475,000 by a particular date. A loan for $476,000 was applied for. The application was declined. The purchasers failed to obtain a refund of the deposit because there was insufficient evidence of an application for a loan of $475,000 or of the purchasers under General Condition 14.2 doing everything reasonably required to obtain loan approval.

**Nomination.**

24. *Mathieson Nominees v Aero Developments & Ors* [2016] VSC 131 concerned general condition 16 under which the purchaser may nominate a substitute or additional transferee but also provided that the purchaser remained personally liable for the performance of all of the purchaser's obligations under the contract. Nonetheless, the document nominating the defendant acknowledged that both original and nominee purchaser would henceforth be jointly liable. Vickery J observed that nomination clauses were usually:

either a direction to the vendor upon settlement to transfer the property to a nominated third party, in which case the rights and obligations under the original contract remained unaffected and the nominee did not become a contracting party, eg ordinarily "A or his nominee";

or a clause permitting the purchaser to nominate someone to stand in the purchaser's place under a novated contract, but the clause would have this effect only if the contract clearly so provided.

This clause was, notwithstanding the words of the nomination document, of the former type, and accordingly the nominee did not gain a purchaser's lien.

**Inability to give vacant possession.**

25. *Qin v Smith (No. 2)* [2013] VSC 476. A property the subject of a contract of sale was leased until a particular date after the settlement date, and this was disclosed in the section 32 statement. However two provisions in the contract, namely

under the heading "Lease (General Condition 1.1)" and General Condition 10.1, required the vendor to provide vacant possession at settlement. Derham AsJ held that the fact that the contract incorporated a Vendors' Statement which disclosed a lease expiring after settlement did not absolve from the obligation to give vacant possession.

**The vendor who has previously sold the land.**

26. In *ZX Group Pty Ltd v LPD Corporation Pty Ltd* [2013] VSC 542 the vendor had previously entered a contract to sell the land to another (friendly) party under which no money had been paid and the time for completion had passed. Before the time for completion of the second contract it was common ground that the first contract was at an end. Nonetheless the second purchaser served a rescission notice based on breach of General Condition 2.3(d) which warranted that the vendor had not previously sold the land. However, Williams J held that this breach did not found a right to rescission only to damages because the vendor's principal obligation was to transfer an unencumbered estate in the land at settlement and before settlement it could take any necessary steps to ensure that that this obligation would be met.

**Payment by unusual means.**

27. In *Douglas v Simons Builders P/L and Anor* [2015] VSC 118 the contract, although not specifying that the deposit must be paid in any particular form (cash or cheque or electronic transfer), clearly contemplated that the monies must be paid in a form in which they may be deposited in a banking account or an account in an authorised deposit-taking institution (General Conditions 11 and 12, as to Payment and Stakeholding). The purchaser accordingly breached the contract by in purported payment of the balance of deposit delivering to a firm of solicitors what the court [11(e)] described as "a promissory note dated 5 August 2014 by which Mr Douglas promised to pay to the order of Simons (or an agent or principle thereof) the sum of $30,500 on 20 August 2014 at 3.15 pm at the Property".

**A purchaser confused about price.**

28. In *Duoedge Pty Ltd v Leong & Anor* [2013] VSC 36 the price specified in the particulars of sale was "916,000 GST inclusive". General condition 13.1

commenced with the words "The purchaser does not have to pay the vendor any GST payable by the vendor in respect of a taxable supply made under this contract in addition to the price unless the particulars of sale specify that the price is 'plus GST'". The particulars did not so specify. The purchaser claimed an input tax credit of one eleventh of $916,000, which was disallowed on the ground that the acquisition of residential property was not a taxable supply under the GST Act as there was not a creditable acquisition by the contract. The purchaser claimed a refund of this amount from the vendor, contending that it was not part of the purchase price but paid on account of GST. A Magistrate upheld this submission on the basis of an alleged implied term.

Dixon J held that there was no implied term and allowed the appeal. Under the contract the GST risk lay with the vendor because of the particulars of sale (although adding "GST inclusive" was incorrect – the absence of the words "plus GST" in the box confirmed the concept of "GST inclusive"), with which general condition 13 was not inconsistent.

**The condition of the property.**

29. A recent example of a purchaser having the right to terminate the contract, because of the vendors' insistence on an untenable position, and exercising that right, is *Patmore & Anor v Hamilton* [2014] VSC 275. General condition 24 as to loss and damage before settlement, inter alia required the vendor to deliver the property in the same condition as on the day of sale, except for fair wear and tear, and did not permit purchaser to delay settlement for breach of this requirement, but established a mechanism for the purchaser to nominate an amount up to $5,000 to be diverted at settlement to a stakeholder to be subsequently argued over.

Water damage occurred after date of contract, which Digby J held to be outside fair wear and tear, but the vendor refused the purchaser's attempt to divert $2,640 in part by not joining in nominating a stakeholder and purportedly rescinded for the purchaser's breach. The purchaser subsequently successfully rescinded.

**Time of day for settlement.**

30. General condition 10.3 provides that subject to the contrary agreement of the parties "settlement day" means 10 am - 4 pm. Accordingly in *Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd* [2014] VSC 57, where

settlement was fixed for 3.30 pm, the purchaser was in default from that time – the argument (at [81]) that settlement could have occurred any time up to midnight was invalid.

**Calculation of vendor's loss if property not resold.**

31. General condition 28.4(c) provides that if the contract ends by a default notice given by the vendor, in addition to any other remedy, the vendor may within one year of the contract ending either: (i) retain the property and sue for damages for breach of contract; or (ii) resell the property in any manner and recover any deficiency in the price on the resale and any resulting expenses by way of liquidated damages.

    *Pettiona v Whitbourne* [2013] VSC 205 illustrates that a claim under condition 28.4(c)(i) will be determined by valuation evidence. Two points of interest in that case were:

    (a) The property was subject to a lease with 11 months to run. One valuer valued the property on the basis that it was subject to this lease but the other valued it assuming a sale with vacant possession because the purchaser had informed him that his offer for the property, which had been accepted, was on the basis of vacant possession. Davies J rejected this: the basis on which the offer had been put did not negate the fact that it was a term of the contract that the property was sold subject to that lease.

    (b) The vendor was entitled to interest on the unpaid balance of purchase price from the agreed date of settlement to the date of expiry of the rescission notice, ie 17 days. The purchaser argued, however, that the rent that the vendor received for the period of approximately 6 months before the rescission must be set off against the interest entitlement. Davies J rejected this, distinguishing *Mallet v Jones* [1959] VR 122, on the ground that here the vendor had the contractual right to interest on the money owing under contract during the period of default "without affecting any other [of her] rights" (general condition 26).

**Vendor's duty on resale.**

32. In ***Portbury Development Co Pty Ltd v Ottedin Investments Pty Ltd*** [2014] VSC 57 the vendor was held to have justifiably rescinded a contract of sale for $6.5 m. The subsequent relevant history was:

| | |
|---|---|
| April – May 2011 | Vendor appoints an agent to resell the property. No offers. |
| 29 June | Property passed in at auction after further marketing campaign. Subsequently the property is sold by the vendor for $2.1 m. |
| 31 October 2011 | Property on-sold by the purchaser from the vendor for $6 m. including an allowance for civil works of $500,000. |

General condition 28.4 provided for the resale of the property "in any manner" This expression authorised the vendor to resell by public auction, tender, expressions of interest or private sale. Further Garde J held –

(a) There was also an implied term that the vendor would act reasonably in the exercise of its power of resale.

(b) The right of resale, and the right to recover liquidated damages, were intended to benefit the vendor as against the purchaser in breach, and did not subordinate the vendor's interests to those of the purchaser. Where the interests of a vendor and the purchaser in breach were in conflict, for example as to the urgency or method of the resale, the vendor was entitled to prefer his own interests, provided that in so doing the vendor acted in a reasonable manner.

(c) The purchasers must show that the vendor either failed to mitigate or did not act reasonably in the resale process and that, as a result, a higher price for the resale of the property was not achieved. In this case the vendor acted in good faith and did everything it could to achieve the maximum price, whilst taking into account its need to meet its obligations to the Bank.

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